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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MICHAEL LEIZEROVITZ,

Plaintiff and Appellant,

v.

DENTAL BOARD OF  
CALIFORNIA,

Defendant and Respondent.

B282679

(Los Angeles County  
Super. Ct. No. BS160788)

APPEAL from a judgment of the Superior Court of  
Los Angeles County. Mary H. Strobel, Judge. Affirmed.

Ford, Walker, Haggerty & Behar, William C. Haggerty and  
Neil S. Tardiff for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Linda K. Schneider,  
Assistant Attorney General, Gregory J. Salute, Deputy Attorney  
General, for Defendant and Respondent.

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Appellant Michael Leizerovitz (Dr. Leizerovitz) appeals from the trial court’s denial of his petition for administrative writ of mandate, in which he sought to have respondent Dental Board of California (the Board) set aside its decision revoking his dental license. We affirm.<sup>1</sup>

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **I. Dr. Leizerovitz’s Treatment of Patient D.M.**

Complaining of pain in the area around tooth #14—the first molar on the upper left side—patient D.M. saw a general dentist in February 2011. That dentist referred D.M. to Dr. Leizerovitz, a general dentist who limited his practice to dental implants and oral surgery.<sup>2</sup> Two days later, D.M. returned to the referring dentist’s office for Dr. Leizerovitz to extract the molar.

Although D.M. was not experiencing any lower-tooth pain at the time, Dr. Leizerovitz advised her that, in addition to tooth #14, the lower left and right wisdom teeth (#17 and #32) also required extraction. According to D.M., Dr. Leizerovitz “convince[d]” her to complete all three procedures that day.

D.M. signed a general consent for oral surgery, a consent for anesthesia services, and a consent to have a coronectomy—a relatively uncommon procedure during which the crown of the tooth is removed but the roots remain intact—performed on tooth

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<sup>1</sup> We also grant Dr. Leizerovitz’s motion to augment the record on appeal. (Cal. Rules of Court, rule 8.155(a)(1).)

<sup>2</sup> Dr. Leizerovitz obtained a dental license in 1985, followed by a conscious sedation permit in 2008. He did not maintain his own dental office at the time he treated D.M.; rather, he was a “traveling surgeon” who performed surgical procedures at the offices of other dentists.

#32. None of the consent forms specifically identified that teeth #14 and #17 would be extracted or that bone grafts with implantable biomaterial would be performed.

Dr. Leizerovitz anesthetized D.M. at 12:20 p.m., but did not begin the surgery until 2:00 p.m. Dr. Leizerovitz first performed the coronectomy on tooth #32. He proceeded to extract teeth #14 and #17, and placed bone-grafting material at each site.

After the surgery, Dr. Leizerovitz did not conduct a follow-up call with D.M. or perform a postoperative examination. Instead, Dr. Leizerovitz's wife, who served as his surgical assistant, called D.M. the day after the surgery. At the time, D.M. did not feel much pain but "was completely numb." Although the numbness subsided within a few days, D.M. began to experience increasing pain in her mouth, and, more than four years after the surgery, she testified that she still had residual pain.

Six months after the surgery, D.M. filed a consumer complaint with the Board, alleging that the extraction of her wisdom teeth was unnecessary and that she was still experiencing pain from the procedures performed by Dr. Leizerovitz.

## **II. The Administrative Proceedings**

### ***The Accusation***

In June 2014, the Executive Officer of the Board filed an accusation against Dr. Leizerovitz concerning his treatment of D.M. The operative third amended accusation, filed in September 2015, asserted causes of discipline for gross negligence, repeated acts of negligence, incompetence, and excessive treatment.

### ***The Administrative Hearing***

A four-day administrative hearing was held in September 2015 before an administrative law judge (ALJ). Prior to the hearing, the ALJ granted the Board's motion in limine, excluding all evidence concerning the Board's past actions against Dr. Leizerovitz on the ground that it was irrelevant to the treatment of D.M.

On the first day of the hearing, Dr. Leizerovitz's counsel stated that he "had to substitute an expert" because the expert he had planned to call "had two small strokes" and was "not completely with it." The ALJ sustained the Board's objection to the substitution based on Dr. Leizerovitz's failure to properly disclose his original expert and to comply with the prehearing conference order.

The hearing proceeded, with the Board calling its expert, D.M., and D.M.'s husband as witnesses. Dr. Leizerovitz testified on his own behalf as both a percipient and an expert witness.

### ***The ALJ's Proposed Decision***

The following month, the ALJ issued a proposed decision, recommending that Dr. Leizerovitz's license be revoked. The ALJ found that Dr. Leizerovitz was grossly negligent by failing to record and/or monitor D.M.'s continuous oxygen-saturation levels and respiratory rate; failing to manage D.M.'s postoperative care; waiting too long after administering anesthesia to begin the surgery; and keeping D.M. under anesthesia for longer than was necessary to complete the surgery. Dr. Leizerovitz was found to have committed repeated acts of negligence by failing to record D.M.'s preoperative medical history; failing to complete or document his preoperative examination findings; failing to obtain D.M.'s informed consent to perform the bone grafts; failing to use

or document the use of a barrier to close the bone-graft sites; failing to record the type of biomaterial used for the bone grafts and the type of fluids infused during the surgery; and failing to obtain and interpret a three-dimensional scan before performing the coronectomy on tooth #32. The ALJ found that Dr. Leizerovitz exhibited incompetence by misdiagnosing root resorption and failing to timely perform the surgical procedures while D.M. was under anesthesia. Finally, the ALJ found that Dr. Leizerovitz provided excessive treatment by placing, without clinical indication, a graft at tooth #17 and by excessively sedating D.M.

### ***The Board's Revocation of Dr. Leizerovitz's License***

In January 2016, the Board adopted the ALJ's proposed decision, to become effective the following month. The Board denied Dr. Leizerovitz's request to stay the execution of the decision, as well as his petition for reconsideration. As a result, his dental license was revoked effective February 25, 2016.

### **III. The Trial Court Proceedings**

Dr. Leizerovitz filed a verified petition for writ of mandate, pursuant to Code of Civil Procedure section 1094.5, asking the trial court to reinstate his dental license. Following briefing and a hearing, the trial court denied the petition, concluding that the weight of the evidence supported the ALJ's findings.

The trial court found no abuse of discretion when the ALJ excluded evidence concerning Dr. Leizerovitz's past interactions with the Board, because the evidence was irrelevant to the treatment of D.M. Nor did the trial court deem it an abuse of discretion to deny the designation of a new expert witness based on the failure to comply with the prehearing conference order and disclosure requirements. The trial court rejected

Dr. Leizerovitz's laches defense and allegations concerning the ALJ's bias. Based on the ALJ's findings, the trial court found that license revocation was a reasonable penalty.

The trial court entered judgment denying Dr. Leizerovitz's petition for writ of mandate, from which this timely appeal followed.

## **DISCUSSION**

On appeal, Dr. Leizerovitz argues, inter alia, that (1) the evidence was insufficient to support the findings against him; (2) the ALJ abused his discretion by excluding Dr. Leizerovitz's expert witness and evidence regarding past interactions with the Board; and (3) in revoking his license, the Board failed to consider its disciplinary guidelines. We disagree.

### **I. Standard of Review and Relevant Law**

The standard of proof in an administrative hearing to revoke a professional license is clear and convincing evidence. (*Sandarg v. Dental Bd. of California* (2010) 184 Cal.App.4th 1434, 1441 (*Sandarg*).) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.] The evidence need not establish the fact beyond a reasonable doubt." (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090.)

Because the ability to practice one's chosen profession is a fundamental vested interest, a trial court reviewing a license revocation on a writ of administrative mandate must exercise its independent judgment. (*Sandarg, supra*, 184 Cal.App.4th at p. 1440.) Although it may ultimately "substitute its own findings" for those of the agency (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 818 (*Fukuda*)), "[i]n exercising its independent judgment, a trial court must afford a strong presumption of

correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Id.* at p. 817.)

Here—where the trial court properly exercised its independent judgment to review the Board’s findings—we review the trial court’s decision under the substantial evidence test. (*Fukuda, supra*, 20 Cal.4th at p. 824.) “Evidence is substantial if any reasonable trier of fact could have considered it reasonable, credible and of solid value. [Citations.]” (*Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal.App.3d 1040, 1052.) This standard can be satisfied by the testimony of a single credible witness. (*Ibid.*) If substantial evidence exists in the record to support the trial court’s judgment, we must affirm. (See *Shenouda v. Veterinary Medical Bd.* (2018) 27 Cal.App.5th 500, 512 (*Shenouda*).)

Finally, we review the form of discipline imposed by the agency for abuse of discretion. (*Hanna v. Dental Bd. of California* (2012) 212 Cal.App.4th 759, 764.) Great deference is afforded to the expertise of the agency, and absent a manifest abuse of discretion the penalty selected by the agency will not be disturbed. (*Ibid.*)

## **II. Substantial Evidence Supports the Trial Court’s Decision**

“[O]ur function on appellate review is solely to decide whether credible, competent evidence supports [the trial] court’s judgment.” (*Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 69.) We find that the judgment here is supported by substantial evidence.

The ALJ explicitly based his findings of Dr. Leizerovitz's gross negligence, repeated acts of negligence, incompetence, and excessive treatment on the report and testimony of the Board's expert, Dr. Peter Krakowiak, an oral maxillofacial surgeon. His testimony and expert report, which was received in evidence at the hearing, provided substantial evidence for each of the ALJ's findings.

Dr. Krakowiak testified that D.M.'s medical records did not show a "proper workup" for surgery, including documentation of a preoperative medical history review or clinical examination. Nor did Dr. Krakowiak find records indicating the type of fluids infused during surgery; the patient's consent for the three bone grafts; whether barriers were used to close the graft sites; and, for tracking purposes, identifying information regarding the graft material used. He opined that these omissions constituted acts of negligence. Dr. Krakowiak further testified to the lack of Dr. Leizerovitz's documentation of the patient's continuous oxygen-saturation levels and respiratory rate during surgery, and that the failure to monitor or record these was grossly negligent.

Dr. Krakowiak also testified that a three-dimensional scan would have shown whether it was necessary to perform a coronectomy and that Dr. Leizerovitz's failure to obtain such a scan before performing the coronectomy was negligent. Dr. Krakowiak opined that because there was insufficient clinical indication for a bone graft at tooth #17, Dr. Leizerovitz performed excessive treatment. Dr. Krakowiak found no evidence of root resorption on tooth #31 and opined that Dr. Leizerovitz's misdiagnosis of root resorption demonstrated incompetence.

In addition, Dr. Krakowiak testified that he could find "no rationale" in the patient's medical records for the delayed start of



surgery—an hour and 40 minutes after the initiation of anesthesia—and that such an extended delay was grossly negligent. The majority of patients, he testified, would feel the effects of intravenous sedatives and narcotics within several minutes, and—absent a medical emergency—there would be no reason to delay surgery for over an hour. According to Dr. Krakowiak, the extended time it took for Dr. Leizerovitz to complete the surgical procedures unnecessarily increased the patient’s exposure to anesthesia<sup>3</sup> and constituted excessive treatment.<sup>4</sup>

Regarding D.M.’s postoperative care, Dr. Krakowiak testified that the follow-up provided by the referring dentist was inadequate and that Dr. Leizerovitz was grossly negligent in failing to conduct the follow-up care himself.

D.M.’s testimony further supported the findings that Dr. Leizerovitz failed to obtain informed consent to perform the bone grafts, failed to promptly begin surgery after administering anesthesia, and failed to manage her postoperative care.

Dr. Leizerovitz argues that his testimony that he performed certain acts, including monitoring oxygen-saturation levels with a pulse oximeter, was un rebutted, even if, due to poor record keeping, these acts were unrecorded or the pertinent records were lost. But the lack of documentation corroborating Dr. Leizerovitz’s testimony is itself substantial evidence that he

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<sup>3</sup> Dr. Krakowiak testified that the risks of conscious sedation include severe allergic reactions, organ failure, and death.

<sup>4</sup> In his expert report, Dr. Krakowiak also opined that the failure to deliver timely surgical care while D.M. was exposed to anesthesia demonstrated incompetence.

did not perform the acts he claims, and it was well within the ALJ's discretion to discount his credibility.

Accordingly, we find that the trial court's judgment was supported by substantial evidence.

### **III. The ALJ's Evidentiary Rulings Were Not an Abuse of Discretion**

Dr. Leizerovitz argues that it was an abuse of discretion to deny his request to substitute his expert witness and to exclude evidence related to his past interactions with the Board. These arguments are unpersuasive.

#### ***A. Substitution of Expert Witness***

The prehearing conference order, issued on August 3, 2015, required each party to file a final witness list by August 28, 2015, that identified all witnesses, including those testifying as experts, that the party anticipated calling. The order explicitly warned that "[n]o witness may testify in the hearing unless said witness is included in the witness list or is offered for the purpose of rebuttal or good cause is shown and is allowed to do so within the discretion of the Administrative Law Judge."

Although Dr. Leizerovitz's prehearing conference statement identified a dentist and lawyer who would provide expert testimony, the record does not reflect that Dr. Leizerovitz ever filed a final witness list as required. Rather, two weeks after the deadline to file the final witness list, Dr. Leizerovitz's counsel sent a letter to the Board's counsel identifying three witnesses he intended to call at the hearing. The expert was not among the witnesses listed. Because Dr. Leizerovitz failed to disclose the expert in compliance with the prehearing conference order, the ALJ would have had a proper ground to exclude that expert's

testimony. Therefore, under these circumstances, Dr. Leizerovitz was not entitled to substitute his original expert.

Dr. Leizerovitz is correct that strict rules of evidence do not apply to administrative hearings. (Gov. Code, § 11513, subd. (c) [hearings under the Administrative Procedure Act “need not be conducted according to technical rules relating to evidence and witnesses”].) It does not follow, however, that an ALJ’s order may be disregarded without consequence. Where Dr. Leizerovitz failed to comply with the explicit requirements of the prehearing conference order for the disclosure of witnesses, it was within the ALJ’s discretion to deny his request to substitute his original expert with another expert.

Moreover, the record does not support the argument that the ALJ exhibited impermissible bias in discounting Dr. Leizerovitz’s expert opinion because he was testifying on his own behalf. The ALJ based his credibility determination on both his conclusion that the “scant dental/medical records [Dr. Leizerovitz] provided concerning D.M. supported D.M.’s testimony and belied” Dr. Leizerovitz’s and “the obvious fact that [Dr. Leizerovitz] is not an independent, unbiased expert.”<sup>5</sup> The ALJ’s credibility determination was not an abuse of discretion, as he could reasonably—and predictably—consider Dr. Leizerovitz’s personal interest in the outcome of the hearing. (See *Rodriguez v. Pacificare of Tex. Inc.* (5th Cir. 1993) 980 F.2d 1014, 1019 [“The fact that the witness is a party is properly considered when the court assesses the witnesses’ credibility”]; *Tagatz v. Marquette*

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<sup>5</sup> In contrast, the ALJ found that Dr. Krakowiak “presented as an extremely well-qualified, well-prepared, knowledgeable independent expert.”

*University* (7th Cir. 1988) 861 F.2d 1040, 1042 [when a litigant testifies as an expert on his own behalf, “[t]he trier of fact should be able to discount for so obvious a conflict of interest”].)

We therefore find no abuse of discretion.

***B. Evidence of Past Interactions with the Board***

Relevant evidence should be admitted in an administrative hearing “if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code, § 11513, subd. (c).) However, it is within an ALJ’s “discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.” (Gov. Code, § 11513, subd. (f).)

Dr. Leizerovitz argues that it was prejudicial error to exclude evidence concerning his past interactions with the Board, which he would have introduced for mitigation purposes and to show bias on the part of the Board and its expert. The ALJ excluded this evidence, concluding that it was irrelevant to Dr. Leizerovitz’s care and treatment of D.M. in 2011. According to the ALJ, evidence of the Board’s motivation for bringing the action against Dr. Leizerovitz was not probative of the merits of the allegations in the Board’s accusation and did not function as mitigating factors.

We agree that the evidence was irrelevant to whether Dr. Leizerovitz’s treatment of D.M. fell below the standard of care and whether the causes of discipline asserted in the accusation had sufficient evidentiary support. To the extent that the excluded evidence might have supported Dr. Leizerovitz’s theory that the Board was biased against him, the ALJ did not abuse his discretion in finding that the Board’s motivation in pursuing

disciplinary charges was neither relevant nor a mitigating factor.<sup>6</sup> And, nothing in the record suggests that the Board's expert was involved in its previous interactions with Dr. Leizerovitz, and therefore the evidence could not have been reasonably used to impeach the credibility of Dr. Krakowiak.

We find no abuse of discretion.

#### **IV. License Revocation Was Not an Abuse of the Board's Discretion**

Dr. Leizerovitz contends that the Board abused its discretion by failing to consider its disciplinary guidelines when it elected to revoke his license. The record does not support his argument.

The Board is indeed required to consider its 2010 disciplinary guidelines in selecting an appropriate penalty, but it has the discretion to deviate from those guidelines absent circumstances not present here. (Cal. Code Regs., tit. 16, § 1018, subds. (a)-(c).) Here, however, the Board *did not* deviate from the guidelines, as license revocation is within the range of recommended penalties for gross negligence, repeated acts of negligence, incompetence, and excessive treatment.

The guidelines provide a nonexhaustive list of 12 factors to be considered when determining whether license revocation,

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<sup>6</sup> The Board's disciplinary guidelines identify the following examples of mitigation evidence: the length of time in practice, the lack of prior disciplinary actions, personal or family issues affecting performance, and early admissions. (See Cal. Code Regs., tit. 16, § 1018, subd. (a) [incorporating by reference the Board's disciplinary guidelines].)

suspension, or probation should be imposed.<sup>7</sup> The guidelines do not state how each factor must be weighed or require the Board to analyze each in writing. Contrary to Dr. Leizerovitz's assertion, there is no indication in the record that the Board failed to consider the guidelines, and the ALJ's proposed decision demonstrates that he considered several relevant factors.<sup>8</sup> Absent evidence to the contrary, we must presume that the Board performed its official duty. (See Evid. Code, § 664; *Shenouda*, *supra*, 27 Cal.App.5th at p. 512.)

Finally, “even were the penalty to appear harsh to us, still we would not be free to substitute our discretion for that of the administrative body. [Citations.] The fact that reasonable minds might differ as to the propriety of the penalty imposed fortifies the conclusion that the administrative body acted within its

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<sup>7</sup> The factors are: “1. Nature and severity of the act(s), offenses, or crime(s) under consideration. [¶] 2. Actual or potential harm to the public. [¶] 3. Actual or potential harm to any patient. [¶] 4. Prior disciplinary record. [¶] 5. Number and variety of violations. [¶] 6. Mitigation evidence. [¶] 7. Aggravating evidence. [¶] 8. Rehabilitation evidence. [¶] 9. In case of a criminal conviction, compliance with conditions of sentence and court-ordered probation. [¶] 10. Criminal record. [¶] 11. Time passed since the act(s) or offense(s) occurred. [¶] 12. If applicable, evidence of expungement proceedings pursuant to Penal Code [s]ection 1203.4.”

<sup>8</sup> For example, the ALJ noted several factors in aggravation, including Dr. Leizerovitz's “fail[ure] to demonstrate any understanding of what he had done wrong during his care and treatment of patient D.M.” The ALJ also concluded that “his continued practice as a licensed dentist [would] pose[] risks to the health, safety and welfare of the public.”

discretion. [Citations.]” (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 579.) Reasonable minds could find it appropriate to revoke the license of a dentist found to have committed acts of gross negligence, negligence, incompetence, and excessive treatment. We therefore decline to find an abuse of discretion in the Board’s decision to revoke Dr. Leizerovitz’s license.

**DISPOSITION**

The judgment of the trial court is affirmed. The Board is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, P. J.  
LUI

\_\_\_\_\_, J.  
HOFFSTADT